

Governmental Immunity from Zoning

Governments often undertake development activities within their own or other communities. For example, a municipality may be undertaking the construction of a new town garage, park, or community building. Likewise, local governments may find their community to be the site of a development action by another nearby municipality or another level of government, such as the county or the state. When this happens, questions are often asked about how zoning regulations affect these development activities. This paper is a guide for local government officials faced with these questions.

Certain acts of government may be exempt, or “immune,” from zoning. Historically, New York courts have recognized that certain entities are entitled to absolute immunity from zoning regulations, including the federal government; state government; state urban development corporations; and public schools. These entities are not required to comply with local land use regulations. Other governmental entities, such as towns, villages, cities, counties and fire districts, are accorded only a limited immunity, and *may* be subject to local land use regulations.

In making a determination as to whether the actions of governmental units with limited immunity are “exempt” from local zoning regulations, the New York Court of Appeals in the 1988 case of Matter of County of Monroe v City of Rochester 72 N.Y.2d 338, 533 N.Y.S.2d 702, established a new method for resolving inter-governmental land use disputes using the “balancing of public interests” analytic approach. Unless a statute exempts it, the encroaching governmental unit is presumed to be subject to the zoning regulations of the host community where the land is located. Working from that premise, a host community then considers several factors to determine whether or not it is in the public interest to continue to subject the encroaching government to its land use regulations. The host community is to weigh the following nine factors:

1. the nature and scope of the instrumentality seeking immunity;
2. the encroaching government’s legislative grant of authority;
3. the kind of function or land use involved;
4. the effect local land use regulation would have upon the enterprise concerned;
5. alternative locations for the facility in less restrictive zoning areas;
6. the impact upon legitimate local interests;
7. alternative methods of providing the proposed improvement;
8. the extent of the public interest to be served by the improvements; and
9. intergovernmental participation in the project development process and an opportunity to be heard.

A subsequent case indicated that a public hearing should be held to elicit public input on the nine factors. Neither the New York Court of Appeals nor the New York State statutes specify which board in the host municipality makes the determination of governmental immunity. This raises two questions – when in the development approval process is this determination made, and who makes it? The following are some alternative scenarios which may lead to a determination of governmental immunity.

A Municipality Developing Within its Own Jurisdiction

When a local government proposes to establish a facility or undertake an activity within its own geographic boundaries, the courts have held that it is subject to the County of Monroe “balancing of interests” test. In other words, the local government is presumed to be subject to its own regulations. Which board conducts the balancing analysis to determine whether this is in the public interest has been a matter of speculation. Some suggestions:

A municipal governing board may choose to bind some or all actions of its own municipality to the requirements of its zoning regulations by specifying so within the zoning law or ordinance. Where a municipality has done so, a zoning permit should be applied for. A referral to the planning board or zoning board for a special use permit or site plan review may be necessary as well. Any immunity challenge that the municipality wishes to make may be brought before the zoning board of appeals.

Where a local government has not bound itself to the requirements of its zoning regulations, the municipal governing board must protect the public interest by examining the nine factors as applied to the current project. It must determine whether it is immune from the requirements of the zoning regulations, and whether a zoning permit is necessary. Even where a municipal governing board has declared an action immune from zoning, it may still wish to comply with the requirements of zoning, where practicable, and with public notice and hearing requirements.

A Municipality Developing Within Another Jurisdiction

In the absence of a statute to the contrary, where a municipality or other governmental unit proposes a project in another community, the two governments should assume that the action is subject to the host community’s zoning requirements. The host community should apply the nine factors set forth in the County of Monroe case to determine the extent to which the host community’s regulations will actually apply. Any disagreement between the parties should be resolved by the appeals process of the host community.

Where a municipality or other governmental unit undertakes development activities associated with a project without applying for a zoning permit, the host community will need to make a determination as to whether to initiate enforcement action against the developing municipality or governmental unit. Any disagreement between the parties should be resolved by the appeals process of the host community.

Unresolved Questions

Although the *County of Monroe* case was decided over ten years ago, several questions regarding the application of the test remain unanswered. First, the case dealt with site plan regulations which were adopted as part of the local zoning law. Whether the decision of the court would apply to the application of site plan regulations adopted independently of zoning, or for that matter to compliance with subdivision review or other land use regulations is has not been resolved.

Second, it is not clear which board in the host municipality weighs the nine factors and determines whether the governmental unit undertaking the development activity is immune from local land use regulations or not. Also ambiguous is *when* in the development process that decision is made.

Finally, where a governmental unit *is* absolutely immune from zoning or other land use regulations, it is unclear what deference that unit of government should give to the host government's regulations. The courts have not answered the question, "Should the immune governmental unit *nevertheless* try to comply with the host municipality's regulations?"

If you would like more information relating to local government powers and responsibilities, please contact either the Tug Hill Commission at (315)785-2380, or the Department of State's Division of Local Government at (518)473-3355.

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